

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

LA'SHADION SHEMWELL, et al.,

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Court of Appeals No.:
21-40798

vs.

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Case No.

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4:20-cv-00687-SDJ

CITY OF MCKINNEY, TEXAS

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Defendant.

10 TRANSCRIPT OF MOTION HEARING PROCEEDINGS
11 BEFORE THE HONORABLE SEAN D. JORDAN
UNITED STATES DISTRICT JUDGE

Thursday, October 22, 2020; 9:37 a.m.
Plano, Texas

APPEARANCES OF COUNSEL:
(Continued on page 2.)

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(Via videoconference)

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12 ALSO PRESENT:

13 Daniel Basham, The Law Offices of William W. Krueger
14 Kristi Kneedler, The Law Offices of William W. Krueger

15 George Fuller, Mayor of the City of McKinney
16 (Via videoconference)

17 Mark Houser, City Attorney
18 (Via teleconference)

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1 October 22, 2020

9:37 a.m.

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3 P R O C E E D I N G S

4 ---oo---

5 THE COURT: We're here this morning on cause number
6 4:20-cv-687, La'Shadion Shemwell versus the City of McKinney.

7 Would counsel, please, make their appearances for
8 the record.

9 MR. ELAHI: Shayan Elahi for the plaintiff. Good
10 morning, Your Honor.

11 MR. ELMAZI: Good morning, Your Honor.

12 Blerim Elmazi for the plaintiffs.

13 MR. HOFMEISTER: I'm Kent Hofmeister on behalf of
14 the City of McKinney.

15 THE COURTROOM DEPUTY: I don't think your mic is
16 on.

17 THE COURT: You have to make sure it's flashing
18 green, Mr. Hofmeister.

19 MR. HOFMEISTER: There we go, all right. Better,
20 all right.

21 Kent Hofmeister representing the City of McKinney,
22 defendant.

23 MR. BROWN: Robert Brown on behalf of the City of
24 McKinney.

25 MR. MARTIN: Michael Martin on behalf of the City

1 of McKinney.

2 MR. KRUEGER: Bill Krueger on behalf of the City of
3 McKinney.

4 THE COURT: All right. Thank you, counsel. Have
5 we covered all lawyers?

6 MR. HOFMEISTER: I think so.

7 THE COURT: And I think I understand we have maybe
8 at least one other person on the line; is that the City's
9 mayor?

10 MR. HOFMEISTER: George Fuller, the mayor of the
11 City of McKinney, I believe is also on the line, as --

12 MR. FULLER: Yes.

13 MR. HOFMEISTER: -- the city -- pardon me. Did
14 you -- was that recorded?

15 (Court reporter nodded in the affirmative.)

16 MR. HOFMEISTER: You got that, okay.

17 The mayor is online. Mark Houser, the city
18 attorney for the City of McKinney, is also on the line.

19 THE COURT: All right. Thank you, counsel.

20 Plaintiffs, it's just the two of you; right? Just
21 the attorneys; is that correct?

22 MR. ELMAZI: Yes, Your Honor.

23 THE COURT: All right. So we're here today on the
24 defendant's motion to dismiss. But I just had one matter I
25 want to address that has to do with the relief plaintiffs are

1 seeking before we proceed on the motion to dismiss, and that
2 is to simply confirm that the plaintiffs are not seeking
3 injunctive relief concerning a recall election scheduled for
4 November 3, 2020.

5 The plaintiffs, in your prayer for relief that was
6 part of your complaint filed on September 13, 2020, do ask
7 that the Court enjoin the recall election. However, as noted
8 in the Court's order of October 6, there was no temporary
9 restraining order filed, there has been no preliminary
10 injunction filed by the plaintiffs. And in the Court's
11 October 6 order, the Court did make clear that if you were
12 seeking injunctive relief regarding this November 3, 2020,
13 recall election, you needed to file a preliminary injunction
14 by October 9. No preliminary injunction has been filed.

15 So I just want to confirm with plaintiffs' counsel
16 that plaintiffs are not seeking injunctive relief regarding
17 the recall election on November 3, 2020.

18 MR. ELAHI: Yes, Your Honor, that is correct. At
19 this point -- (inaudible/indecipherable)

20 THE COURT: Mr. Elahi, I think we're having some
21 problem with your sound. It may be that you need to get
22 closer to your microphone, and you might want to speak up a
23 bit and maybe speak a bit slowly. But we really couldn't
24 hear anything you said. I'm sorry.

25 MR. ELAHI: No, Your Honor, I apologize. Let me

1 start again, Your Honor. Is this better, Your Honor?

2 THE COURT: It's better. I think you might get a
3 little bit closer, if you can, and speak slowly.

4 MR. ELAHI: Your Honor, I don't want to scare
5 people with the video. Maybe I should --

6 THE COURT: That's good. Where you're just at now,
7 I think you're coming through pretty clearly.

8 MR. ELAHI: Okay, Your Honor.

9 THE COURT: I think we just lost Mr. Elahi's
10 signal.

11 Mr. Elmazi, do you want us to wait for your
12 co-counsel to come back?

13 MR. ELMAZI: Yes, Your Honor, if you don't mind.

14 THE COURT: That's not a problem.

15 MR. ELAHI: Your Honor, can you hear me? I'm
16 sorry, the screen froze. Were you able to hear me, Your
17 Honor?

18 THE COURT: No. I think what happened is the
19 screen froze -- and I couldn't tell if we lost your signal --
20 it went black. But you're going to have to repeat your
21 response to my question.

22 MR. ELAHI: Yes, Your Honor. We are not seeking
23 injunctive relief, Your Honor, temporary injunctive relief,
24 regarding the election on November 3rd. That is correct.

25 THE COURT: All right. Thank you, Mr. Elahi.

1 So we are here on the defendant's motion to
2 dismiss. I just want to let everyone know that I have read
3 all of the paperwork, and that includes, obviously, the
4 complaint, the dismissal motion, the response to the
5 dismissal motion that was filed by the plaintiffs. But we're
6 here for argument on the motion, and we'll let the defense
7 counsel proceed, and then we'll hear from the plaintiffs.

8 And, by the way, Mr. Hofmeister, when you're
9 addressing the Court, it's your choice. If you'd like to
10 pull your mask down, you can. If you're more comfortable
11 keeping it on, you can do that, too.

12 MR. HOFMEISTER: I think I would be more
13 comfortable taking it off.

14 But before I begin, Your Honor, if I may, we have
15 a -- we have printed out copies of those documents -- I'm
16 going to come and get those in just a second, yeah --
17 documents that we ask the Court to take judicial notice of in
18 the footnotes in the motion to dismiss. And if I may have
19 permission to approach so that the Court could have those for
20 its reference.

21 THE COURT: Certainly.

22 MR. HOFMEISTER: Thank you. And we have not had
23 the opportunity, since opposing counsel is not here in the
24 courtroom this morning, to give them a copy of that, but we
25 can certainly do that.

1 As I said, the documents that we're referring to
2 are documents that were identified in the motion to dismiss,
3 and they were -- there was a link provided so that access to
4 the documents could be had.

5 If I may I approach, Your Honor?

6 THE COURT: Yes.

7 (Documents provided to the Court.)

8 MR. HOFMEISTER: Thank you.

9 THE COURT: And these documents, Mr. Hofmeister,
10 they -- the reason that you provided links is they are public
11 records that are available, I take it, on the City's website.

12 MR. HOFMEISTER: That is correct, either on the
13 City's official website or the State of Texas official
14 website. They are, for instance, copies of Council -- City
15 Council minutes. The reference to the State of Texas website
16 has to do with early voting starting on October the 13th,
17 things again that are public knowledge and available to
18 everyone.

19 THE COURT: All right. Thank you. And you can
20 proceed.

21 MR. HOFMEISTER: Thank you, Your Honor.

22 Kent Hofmeister, on behalf of the City of McKinney.
23 We're here this morning, as the Court has noted, on the City
24 of McKinney's motion to dismiss.

25 We have been here before. As the Court will

1 recall, this is the second time a case has been brought by
2 plaintiff La'Shadion Shemwell against the City of McKinney on
3 the same -- basically, the same claims if not the identical
4 claims.

5 Originally, the first suit was brought in January
6 of this year. A TRO hearing was held that was rescheduled
7 for a preliminary injunction. No injunctive relief was ever
8 pursued by the plaintiff. At that point it was solely
9 Mr. Shemwell, it was not any additional plaintiffs. But no
10 injunctive relief was pursued and, as a result, no injunctive
11 relief was granted. And in March of this year, less than two
12 months after the suit was filed, the case was voluntarily
13 dismissed.

14 Then six months later, September of this year, last
15 month, plaintiff filed this lawsuit. But now we have two
16 additional plaintiffs in the case, the Florine Henry and
17 Debra Fuller.

18 So the claims made in this case the Court is
19 familiar with, but just to review some basic elements of
20 this, the plaintiff -- plaintiff Shemwell here is a
21 sitting City of McKinney City Council member. He represents
22 District 1, a single-member district. He is the only
23 African-American Council member sitting on the Council at
24 this time. He was elected in 2017, and his term is a
25 four-year term and is set to expire in May of next year,

1 2021.

2 Just briefly, a little bit of background and what
3 is alleged in the complaint is that there was a charter
4 amendment election in May of 2019, and the complaint alleges
5 that that was a result of a voter-initiated petition drive.
6 The result of that election was that the charter was amended
7 at that time, and what that meant was that there were fewer
8 names that were needed for a recall petition.

9 There was time -- or, rather, the time to collect
10 signatures for a petition was increased from 30 to 45 days,
11 and that any recall election for a Council member would be
12 citywide. That was a clarification of the charter.

13 Then in December of 2019, this past December, a
14 recall petition was submitted to the City Council for the
15 recall of Councilman Shemwell. That petition was then
16 certified by the City Secretary, Empress Drane, on January
17 the 7th of 2020.

18 And the way the charter is set up, what it provides
19 is that once the subject of a recall election has been
20 notified that he or she is the subject of that recall, then
21 he -- that person, that Council member, has five days within
22 which to resign. That did not happen here.

23 And so under the charter and under state law, the
24 Council then proceeded by adopting an ordinance that called
25 for a recall election. And that recall election was

1 originally scheduled for May of 2020, and that was going to
2 be a citywide recall election under the newly amended
3 charter.

4 As we all know, shortly thereafter, March of this
5 year, the entire country was hit with the COVID-19 pandemic,
6 and that impacted everything, including the political aspects
7 of the country, of the state, of the towns and cities. And
8 that was true of the City of McKinney as well.

9 Governor Abbott issued a proclamation in the middle
10 of March in which he encouraged all cities across the state
11 to postpone or move their elections from May to November the
12 3rd, and that's exactly what the City of McKinney has done.

13 So right now, the position we are in is that there
14 is a recall election scheduled for November the 3rd for --
15 calling for the recall of, the removal of, or not -- of
16 Councilman Shemwell, but it's a matter that is going to be
17 left to the voters of the City of McKinney.

18 So the issues that we have here and the issues for
19 the Court to decide today are twofold, essentially. The
20 first one is brought under Section 1983, 42 U.S.C. § 1983,
21 and the Fourteenth and Fifteenth Amendments. The plaintiffs
22 here point to the statute Section 1983, which provides that
23 it is unlawful for to deprive any person of his or her
24 constitutional rights or protections under color of state
25 law.

1 And it's important to note here that what we're
2 dealing with is the City of McKinney. It's a governing -- I
3 mean, it's a governmental body, it is not an individual --
4 it's not an individual in an official or an individual
5 capacity. So when we talk about liability attaching to a
6 city, we have to talk about what the municipal policy maker
7 is.

8 And the law in this area is well established, it
9 goes back to the *Monell* case, which interpreted governments
10 as being persons for purposes of the statute, and *Monell* and
11 its progeny -- you go through *Praprotnik* and *Bryan County* and
12 those cases -- that establish that in order for a city to be
13 liable, a governmental entity to be liable, the plaintiff
14 must plead and prove that the -- that the injury visited upon
15 the plaintiff was the result of some sort of a policy, a
16 municipal policy, practice, custom, or usage.

17 And in this case we don't have -- we don't have
18 that kind of nexus that the City visited this injury upon the
19 plaintiffs. What we have is a City Council that was required
20 to submit to the voters to decide whether or not the
21 councilman should be recalled. Were they the so-called
22 moving force behind the action taken? Our position is no,
23 that the City was not the moving force behind this.

24 What they did was what they were required to do by
25 law, and that is once they were -- once they were

1 presented -- once the City Council was presented with a
2 petition, that petition, after the five-day period lapse,
3 then the Council, the City, had to go ahead and schedule the
4 recall election.

5 And now we are in a position where roughly two
6 weeks from today, the voters will decide whether or not
7 Councilman Shemwell will be recalled and will either stay as
8 a sitting member of the City Council or be removed as a
9 member of the City Council.

10 But it's important to note that it's a municipal
11 policy maker. It is -- the first is, rather, the ultimate
12 decision maker, and that is the governing body for the City.
13 And in this case, that causal connection is broken by the
14 voters making the decision, as the City is required to
15 present it to the voters to make that decision.

16 A municipal policy maker is not an individual
17 acting either in his or her individual or official capacity.

18 Yes, Your Honor.

19 THE COURT: As I understand your argument, it's
20 basically that the plaintiff has to allege an injury that is
21 the result of some sort of a City policy, or ordinance, or
22 action on behalf of the City, as opposed to something that's
23 an action on behalf of the voters --

24 MR. HOFMEISTER: That's correct.

25 THE COURT: -- is that correct?

1 MR. HOFMEISTER: That is correct, Your Honor.

2 THE COURT: Okay.

3 MR. HOFMEISTER: The second cause of action that
4 has been presented by the plaintiffs is under the Voting
5 Rights Act, Section 2. And as the Court noted before, they
6 originally sought injunctive relief. The Court, in its order
7 of October the 6th, ordered plaintiffs to file a motion for a
8 preliminary injunction if indeed that was their intent to
9 pursue that injunctive relief. No motion was filed by the
10 9th. As we heard earlier this morning, the plaintiffs have
11 withdrawn any sort of request for injunctive relief. So that
12 issue is not before the Court this morning or at all.

13 Now, what the plaintiffs are saying is that under
14 the Voting Rights Act, that the citywide recall election
15 process was motivated in part by the City's racial animus or
16 discriminatory motive, and it is being maintained to
17 purposely dilute the plaintiffs of their voting strength and
18 to remove Councilman Shemwell from his Council seat.

19 But as we've already stated, this is not an action
20 by the City Council. This is, rather, a matter where the
21 Council was required by law to present it to the voters, and
22 the voters will make that decision.

23 Plus, we don't know yet what the result of that
24 election will be, so we don't even know whether there will be
25 an injury, the one that apparently is feared by the

1 plaintiffs, and particularly Councilman Shemwell, that he
2 might be removed as a result of the election.

3 We would point the Court to the decision, pardon
4 me, that we noted in the motion to dismiss and also in our
5 reply. And I assume the Court has seen the reply that we
6 filed. Yes?

7 THE COURT: Yes, I have.

8 MR. HOFMEISTER: Okay. All right. And we
9 revisited the authorities in part there, and particularly
10 this one case, and that was *McBride v. The City of Jasper*.
11 And in that situation, you had two council members who were
12 subject to the recall because they had appointed a police
13 chief and the voters were upset with that result.

14 And the Court there, in looking at that, said that
15 the recall procedures were provided by the city's charter.
16 It's very much like what we have here with the City of
17 McKinney and in this case. But the recall procedures
18 provided by the charter allowed the city's qualified voters,
19 on an at-large basis, to subject the city council member
20 representing a single-member district to a recall election.

21 The Court there importantly noted that courts are
22 generally reluctant -- and those are the words, that's the
23 word it used, "reluctant" -- to apply the Voting Rights Act
24 to the petition process, and it particularly noted three
25 cases, federal court cases, from the Ninth, the Tenth, and

1 the Eleventh Circuits, *Padilla*, *Montero*, and *Delgado*, that
2 have held that in fact the Voting Rights Act does not apply
3 to voter-initiated petitions.

4 *McBride* also noted that the plaintiffs there had
5 not cited any authority that a city charter violated the act
6 by allowing citizens, on an at-large basis, to subject
7 elected representatives from a single-member district to a
8 recall election. And because there was no authority provided
9 by the plaintiffs there to that effect, the *McBride* court
10 held that the plaintiffs' claims failed because the issue was
11 unresolved in the Fifth Circuit.

12 So I think we find ourselves in, basically,
13 certainly a similar situation, if not virtually identical
14 situation, in this case.

15 THE COURT: Well, there is -- but there is a
16 notable distinction, is there not, between the *McBride* case
17 and indeed the cases it relies upon and this case because
18 there is a distinction between the petition process and then
19 the actual recall vote itself. And *McBride* is speaking to
20 the issue of a petition, and that the cases from the Circuits
21 it relies upon are looking to the issues of petitions that
22 are being initiated by voters or others rather than by a
23 state entity.

24 But here, it seems part -- at least part of the
25 plaintiffs' complaint is about the fact that when the recall

1 count vote -- I'm sorry, the recall vote itself is made, that
2 vote will not be just by the members of District 1 for
3 Mr. Shemwell, but will be citywide. And I think that was an
4 issue that was noted in *McBride*, and the Court decided it was
5 not an issue because in *McBride*, in the *Jasper* case, the vote
6 was going to be limited to the voters in that single-member
7 district. In other words, the recall vote in that case was
8 going to be limited to the members of the district and it was
9 not going to be an at-large vote.

10 And in fact, the Beaumont Court opinion, the Ninth
11 Circuit Court of Appeals opinion from Texas, when it
12 addressed that issue, noted in response to the allegation
13 that it would violate the Voting Rights Act to allow the
14 citywide vote, the Beaumont Court of Appeals noted that it
15 would only be a vote within the single-member district.

16 You can let me know if I've got any of that wrong.
17 But that's my understanding of at least what appears to be a
18 notable distinction between *McBride*, the Beaumont Court of
19 Appeals opinion that underlies *McBride*, and the three Circuit
20 Court opinions that are relied upon in *McBride* which
21 concerned petitions -- the petition process and in fact
22 whether petitions needed to be, for example, in English and
23 Spanish, et cetera.

24 Can you address that distinction here? It looks
25 like this is a bit different than *McBride*.

1 MR. HOFMEISTER: It is a distinction, Your Honor.
2 But as the court in *McBride* indicated, there is no authority,
3 or at least the status of the law in the Fifth Circuit is
4 unresolved. And so for that reason, it decided that it would
5 not -- it would not -- it would dismiss the claims of the
6 plaintiff in that case.

7 So I think again we're back to where we are in this
8 matter, and the claims for the -- the plaintiffs' claims
9 should be dismissed for failure to state a claim.

10 THE COURT: Yeah. I think we'll hear from the
11 plaintiffs --

12 MR. HOFMEISTER: Sure.

13 THE COURT: -- on that as well, but I think that
14 issue at least makes it not identical to *McBride*, and it's a
15 notable distinction, and those cases that *McBride* relied
16 upon.

17 And so another question I had for you is whether
18 there is any other case law -- it can be from Texas, it can
19 be from around the country -- that you think may be
20 applicable in this sort of recall election context. Because
21 there is dicta in *McBride* going both ways.

22 MR. HOFMEISTER: Correct.

23 THE COURT: Some of the dicta in *McBride* I think is
24 counter to your position. Some of the dicta in *McBride* talks
25 about the judge, he doesn't really need to address the issue,

1 but not necessarily being persuaded that the Voting Rights
2 Act applies to recall elections.

3 Is there any other precedent from around the
4 country that you can cite?

5 MR. HOFMEISTER: Let me just say this before I
6 respond to that. And that is the dicta in *McBride* that might
7 be favorable to plaintiffs was really regarding a
8 hypothetical, it was the -- a violation might occur if, but
9 it had nothing to do the with the -- I mean, that court never
10 ruled on that issue, and that issue was never before the
11 Court upon which to rule. So for that reason, I think that
12 that dicta is really inapposite to our situation.

13 As far as having any other case law to present to
14 the Court this morning --

15 THE COURT: Well, let me read to you some other
16 dicta that I think goes against your position --

17 MR. HOFMEISTER: All right.

18 THE COURT: -- and this is in the conclusion. The
19 Court says, quote, "Common sense suggests that the ability to
20 recall a single-member district's representative should be
21 restricted to only those voters with the authority to vote in
22 the recall election itself."

23 And so I think there is some language in there
24 going both ways.

25 MR. HOFMEISTER: There is some, Your Honor. But I

1 think common sense also would dictate that a representative
2 from a single-member district should also easily be placed in
3 a situation where they are subject to a recall citywide
4 because the actions of any council member are going to impact
5 the city, the community, as a whole. And I think a good
6 argument and a common sense argument can be made that a city
7 should be able to vote citywide on a recall of a -- even a
8 single-member district representative.

9 THE COURT: All right. Although I suppose that
10 logic would apply in the first instance then to electing that
11 member in the first instance. And, of course, I think it was
12 1991 that the City amended its charter from what I suppose
13 before that was all at-large Council members to assist in
14 that.

15 MR. HOFMEISTER: I believe that that's -- I believe
16 that that's right. But one of the cases that we cited, and I
17 don't have it in front of me at the moment, that talks about
18 how the -- I'm trying to remember -- might be the *Smith* case
19 talks about how the -- when we're talking about recall, that
20 we're really looking at the election process in the
21 beginning, and not -- the act that applies to the election at
22 the beginning, and not to the recall process. And for that
23 reason, again, another Fifth Circuit court we cited both in
24 our --

25 THE COURT: That's *Smith v. Winter*?

1 MR. HOFMEISTER: -- our motion -- yes. *Smith v.*
2 *Winter*, correct. Correct.

3 THE COURT: All right. I don't know if you have
4 other precedent that you wanted to cite today.

5 MR. HOFMEISTER: Thank you. At this time, we do
6 not, but we would be more than happy -- if the Court would
7 like for us to look and present the Court with any additional
8 authority, we would be happy to do that.

9 THE COURT: All right. We may do that. I'll let
10 you-all make your arguments today, and we may very well do
11 that. And I'll let you proceed with your argument. I didn't
12 know if you had additional points to make before we hear from
13 the plaintiff. And you'll have an opportunity, by the way,
14 to give some rebuttal arguments. So --

15 MR. HOFMEISTER: Okay.

16 THE COURT: -- whenever you're concluded with your
17 sort of opening --

18 MR. HOFMEISTER: Actually, Judge, I mean, that
19 concludes my comments on the matter. We, of course, filed a
20 motion to dismiss. We're asking the Court to dismiss all
21 claims on behalf of the plaintiffs in this case.

22 THE COURT: I do have another question for you --

23 MR. HOFMEISTER: Yes.

24 THE COURT: -- right now, as long as you're up. It
25 seemed to me that at the end of your motion, in the last few

1 pages of your motion, you addressed I think the *Gingles*
2 factors, or I think you -- at least you raised them, I think.
3 It seemed to me that that was a second alternative argument
4 you were making that the plaintiffs don't satisfy or haven't
5 pled -- adequately pled the *Gingles* factors, but I want to
6 make sure I was reading that correctly.

7 Most of your motion to dismiss has to do with the
8 Voting Rights Act not applying, and your arguments concerning
9 *Monell*, but I thought I understood the last few pages of your
10 motion to address the plaintiffs' pleadings with regard
11 to *Gingles*. Am I correct?

12 MR. HOFMEISTER: I think that what you are
13 referring to is the argument that we made in the motion to
14 dismiss when the injunctive relief -- the request for
15 injunctive relief was still pending. And the argument there
16 was that they could not meet the *Gingles* factors, as you've
17 referenced them, because they would not -- there was not a
18 substantial likelihood that they would prevail on the merits,
19 one of the four elements required, because the courts have
20 held that there's no cause of action under the Voting Rights
21 Act.

22 THE COURT: And that, would those -- but those
23 factors, in other words, those are also part of the pleading
24 requirements in a case like this.

25 MR. HOFMEISTER: Absolutely. Absolutely.

1 THE COURT: All right. And do you have any further
2 comment to make on that issue?

3 MR. HOFMEISTER: I do not. Not at this time, Your
4 Honor.

5 THE COURT: All right. Then thank you,
6 Mr. Hofmeister. We'll hear from --

7 MR. HOFMEISTER: Thank you, Judge.

8 THE COURT: -- plaintiffs, I suppose it will be
9 Mr. Elahi, on their response to the motion.

10 MR. ELAHI: Yes, Your Honor. Thank you, Your
11 Honor. And thank you for allowing us to appear by Zoom. We
12 appreciate it. Your Honor, I'm going to get closer so you
13 can hear me better. Is this better, Your Honor?

14 THE COURT: Yes. And you might -- so our court
15 reporter can take down what you're saying, which is going to
16 be important, you may want to try to speak slowly. And I'll
17 warn you in advance that either myself or my court reporter
18 might interrupt you because she may know that she's not
19 getting it and can't hear you well enough. So bear with us.
20 If we stop you and have you repeat something, we want to make
21 sure the record is clear.

22 MR. ELAHI: Of course, Your Honor.

23 THE COURT: You can proceed.

24 MR. ELAHI: Your Honor, let me ask if you would
25 mind if I just turn the video off because I feel like I'm too

1 close to the computer. I'm -- I won't be able to read my
2 notes. Is that okay? Or do you wish me to stay on the video
3 as well?

4 THE COURT: No, that's fine. You can turn the
5 video off at least for this purpose.

6 MR. ELAHI: Thank you, sir. I appreciate that.

7 Your Honor, good morning. I'm here on behalf of
8 the three plaintiffs in this case, Your Honor, Council Member
9 Shemwell, Florine Henry, and Debra Fuller.

10 Your Honor, this case, at this point, is not just
11 about Council Member Shemwell, it is about the voters of
12 District 1. I believe most of the argument we heard from the
13 City revolved around Council Member Shemwell and his
14 situation as being at the other end of the recall election.
15 Whereas, Your Honor, our provision is that we are in front of
16 your court today to seek a resolution to what we believe is
17 an act of voter dilution and a violation of voter
18 protection -- I'm sorry, of Voting Rights Act.

19 I believe, Your Honor -- we believe that, yes, as
20 the other side conceded, there is no other precedence here in
21 Texas. Your Honor, I wasn't able to find anything outside
22 Texas, at least in the search I did, for the response to my
23 motion. But if Your Honor would allow both sides -- because
24 I know the other side is seeking it as well -- more time to
25 brief the Court, Your Honor, we would like the same

1 opportunity, of course, Your Honor.

2 But we have come to your court seeking a resolution
3 to what we believe remains an un -- let me rephrase that --
4 an issue that has not been raised in Texas yet, Your Honor,
5 in this fashion. And we believe McKinney -- McKinney's
6 actions -- City of McKinney's actions have made them opened
7 to such a challenge, which we believe we have brought to your
8 attention.

9 And, Your Honor, we seek a remedy in your court to
10 basically tell the City of McKinney that, yes, you can have a
11 City -- you can have a charter amendment. Yes, you can do
12 that. And, yes, you can try to recall people who are sitting
13 on the Council; there is nothing wrong with that. But what
14 you cannot do is hide behind a citizen-initiated petition and
15 use the City Council as a tool to basically push your agenda
16 against a specific person who is -- has been elected by a
17 specific district.

18 And why can they not do that, Your Honor? Because
19 there is a reason why you went to single-member districts.
20 Your Honor, you, yourself, noted that City of McKinney, I
21 believe you said 1991 is when they formed the districts and
22 allowed people to elect their own, you know, neighbors and
23 people they knew from their own districts to represent them.
24 And kudos to City of McKinney because, Your Honor, they did
25 not require a lawsuit to do that, which a lot of cities were

1 forced to do by different people over the years after the
2 Voter's Right -- Voting Rights Act.

3 So City of McKinney decided itself that it was
4 going to move away from a citywide model and into a district
5 model or a single-member district model to make sure that
6 people are represented. And, Your Honor, what they did, when
7 they basically allowed -- when they amended the charter and
8 they allowed a single-member district representative to be
9 taken out, to be recalled by the whole City, not in the
10 petition -- anyone can sign the petition, we concede that --
11 but what we're saying is that only a single-member district
12 voter can vote his or her representative out. And that's
13 why, Your Honor, it's so important to focus that we have
14 three plaintiffs here and not just Council Member Shemwell.

15 Your Honor, I don't think anyone in this courtroom
16 is naive enough to think that political animus and things
17 like that do not work in both directions. Obviously, these
18 are -- you know, that's what politics is. We understand
19 that. But what we cannot do, Your Honor, is to use the City
20 Council as a political tool to basically violate
21 constitutional rights to get your political goals and your
22 political opponents out of office.

23 Why would we say that, Your Honor? Because we
24 believe that there is a nexus that we can basically prove if
25 we are allowed to go forth in this lawsuit, Your Honor. We

1 believe the City Council was working as a unison, as one
2 body, to basically -- towards the goal of getting
3 Mr. Shemwell out.

4 Your Honor, I have noted in my response to the
5 motion to dismiss that we have a video of Mr. Fuller, Mayor
6 Fuller, actually having people over his house, paying them
7 for getting the petition signed. Your Honor, we have many
8 posts by other City Council members and Mayor Fuller -- and
9 it's not personal, we're just telling you what evidence we
10 have at this point without even going into discovery --
11 basically promoting this petition in his official capacity,
12 not as an individual citizen which I believe he has a right
13 to do.

14 Your Honor, the focus, I believe, when the City
15 says we cannot plead and prove, Your Honor, we have pled and,
16 given a chance, we can prove that there is a nexus, there is
17 causation, Your Honor, and that the City was a moving force
18 behind what ended up happening in McKinney as far as the
19 petition is concerned.

20 But, Your Honor, even if we were to set that aside,
21 let's say we -- let's say arguendo we concede the point that
22 the petition was citizen initiated. The question still
23 stands whether the goal of the petition, which allowed the
24 whole City to vote out, potentially vote out, a district --
25 single-district representative, is on its own face

1 constitutional.

2 And I believe, Your Honor, this may be a case of
3 first impression, as far as I can see, in Texas where, Your
4 Honor, your court and Your Honor is -- basically has to
5 decide whether, one, whether this case should go forward,
6 given what we know at this point, and allow discovery so we
7 can provide Your Honor with more information to make a
8 judgment on this case, on the Section 2 issue, as well as a
9 1983 causation issue, the moving force issue; and, Your
10 Honor, that you would be the one deciding one way or another
11 whether what the City did was constitutional.

12 As far as injury is concerned, Your Honor, the
13 injury is already there. The injury is about to happen on
14 November 3rd, as far as we're concerned. Yes, we're not
15 seeking injunctive relief because, Your Honor, it's just not
16 practical. And I believe the first time we came in front of
17 you, we went over the *Gingles* analysis. And I believe at the
18 end of it, I took my injunctive relief -- injunctive relief
19 request back because I couldn't make that argument, and I
20 think I'm in the same position.

21 Also, Your Honor, obviously given COVID and given
22 everything that's happened, you know, it's better to let the
23 election just happen instead of having more problem.

24 But regardless, Your Honor, going back to my
25 argument, what I'm trying to say is the injury's already

1 happened, because on November 3rd Mr. Shemwell will go in
2 front of the whole city to be recalled, and we believe that's
3 a constitutional violation. And if Your Honor was to find
4 that at a later date, it won't obviously rectify what happens
5 on November 3rd, but at the same time, Your Honor, going
6 forward, I believe we can save other constitutional
7 violations from occurring.

8 So I believe, Your Honor, I'm not going to -- I
9 believe I'm completely in sync with, Your Honor, the analysis
10 of *McBride*, because I believe that's what we argued in our
11 response as well, Your Honor, so I'm not going to belabor the
12 point and waste your time.

13 Your Honor, we believe that basically at this
14 point, if you would allow us to go forth with discovery, we
15 can prove that not only was this not, um, a solely a
16 citizen-initiated petition, that there was the City Council
17 was the moving force behind it. We can also, Your Honor,
18 prove that basically Section 2 was violated. And that, Your
19 Honor, should find that going forward, district --
20 single-district members should only be recalled by their own
21 voters, even if the petition is citywide. Thank you, Your
22 Honor.

23 THE COURT: Mr. Elahi, I have just a few questions
24 for you. But we'll hear from Mr. Hofmeister if he would like
25 to add anything. A couple of them are -- just have to do

1 with recall procedure itself, so -- and we may hear from
2 Mr. Hofmeister again on this. So can you remind me, you
3 know, per the City's charter, what are the grounds for
4 recall? Is it something like incompetence or corruption? Or
5 are you aware of the specific language that's provided in the
6 City's charter for what the grounds are for recall?

7 MR. ELAHI: Your Honor, I do not have it in front
8 of me. If my co-counsel does, I would appreciate it if he
9 would chime in, Your Honor. But I believe it wasn't
10 corruption, it wasn't any of that. It was basically to bring
11 the City in ill repute by asking -- there were a few things,
12 but basically using his First Amendment right, he apparently
13 called for -- Mr. Shemwell, not the other plaintiffs, called
14 for black state of emergency to be as a resolution passed by
15 the City Council. So things of that nature. But he has
16 never been charged with corruption or anything of that sort,
17 nor was it brought up.

18 Do you have that, by any chance? Your Honor, I'm
19 asking my co-counsel.

20 THE COURT: Yes, and to be clear for both of you,
21 my question is not specific to Mr. Shemwell, it's -- it is a
22 general question about what the City's charter provides as
23 far as any City Council member, you know, being recalled,
24 does the charter speak to what the grounds would be.

25 MR. ELMAZI: Your Honor, I don't have the exact

1 language, but I believe it was something to the effect that
2 you can be recalled for incompetence, malfeasance, or
3 misconduct, broadly speaking.

4 THE COURT: And I see Mr. Hofmeister is standing.
5 So you may have the exact language in the charter provision.
6 If you do, that would be helpful.

7 MR. HOFMEISTER: If I may, Your Honor.

8 THE COURT: Yes.

9 MR. HOFMEISTER: I think that the City charter at
10 Section 144 addresses recall and the procedure. And if I may
11 read that into the record.

12 THE COURT: Yes.

13 MR. HOFMEISTER: It's a paragraph, but it states
14 that, *Any five voters of the City of McKinney may make and*
15 *file with the City Secretary an affidavit containing the*
16 *names or names of the officers whose removal is sought and a*
17 *statement of the grounds for removal. The City Secretary*
18 *shall thereupon deliver to the five voters making such*
19 *affidavit copies of petition blanks demanding such removal.*

20 I'm sorry -- the City Secretary shall keep -- let
21 me read this. The City Secretary shall keep a sufficient
22 number of such printed petition blanks on hand for
23 distribution. Such blanks, when issued by the City
24 Secretary, shall bear the signature of that officer and be
25 addressed to the City Council and shall be numbered, dated,

1 and indicate the names of the voters to whom issued.

2 The petition blanks, when issued, shall also
3 indicate the number -- the number of such blanks issued and
4 the name of the officer whose removal is sought. The City's
5 Secretary shall enter in a record to be kept in their office
6 the name of the electorate to whom the petition blanks were
7 issued and the number issued to said voters.

8 So Section 144 does not set out a list of grounds
9 upon which a Council member might be recalled, it just says
10 that the papers will be filed and a statement of the grounds
11 for removal will be provided.

12 THE COURT: So the charter doesn't provide any
13 standards for the voters in regard to what are the grounds
14 for recall, it's essentially left entirely up to the voters
15 if this is initiated by the voters; is that correct?

16 MR. HOFMEISTER: That is my understanding, Your
17 Honor. All right. Here's a --

18 THE COURTROOM DEPUTY: It looks like we lost
19 Mr. Elahi --

20 THE COURT: Oh, we lost -- I think we did lose
21 Mr. Elahi. And I was just about to go to my --

22 MR. ELAHI: No, Your Honor. I'm here.

23 THE COURT: Oh, good. All right. We have a video
24 screen up where we see everybody's name, and if we have video
25 for them. And we have your co-counsel, Mr. Elmazi. We don't

1 see you. But if you're on at least by audio, that will be
2 sufficient. Oh --

3 MR. ELAHI: Yes, Your Honor. I'm here.

4 THE COURT: All right. Well, it's timely because
5 the second question I have, and this again is a general
6 question on procedure regarding recall, is presuming that
7 Mr. Shemwell is -- the result of the election is that he is
8 recalled, what is the procedure at that point with regard to
9 having a new Council member for District 1? And it would be
10 helpful to know what the procedure is. Is there a new vote
11 among members of District 1 for a new Council member? Or
12 what is the process for replacing someone in Mr. Shemwell's
13 position if they are voted out by recall?

14 MR. HOFMEISTER: Your Honor?

15 THE COURT: Yes, Mr. Hofmeister, you can answer
16 that.

17 MR. HOFMEISTER: Thank you, Your Honor. Again,
18 looking at the City charter for the City of McKinney, at
19 Section 148, Results of the Recall Election -- and I'm going
20 to read this in full -- *If a majority of the votes cast at a*
21 *recall election shall be against the recall of the officer*
22 *named on the ballot, he shall continue in office for the*
23 *remainder of their unexpired term subject to recall as*
24 *before.*

25 *If a majority of the votes cast at such election*

1 shall be for the recall of the officer named on the ballot,
2 he shall, regardless of any technical defects in the recall
3 petition, be deemed removed from office and the vacancy shall
4 be filled by state law.

5 THE COURT: And do we know -- as you stand here
6 today, Mr. Hofmeister, do you know how that -- what state law
7 would call for in terms of next steps to fill that Council
8 position?

9 MR. HOFMEISTER: Your Honor, I believe that if the
10 recall election results in Mr. Shemwell -- Council Member
11 Shemwell being removed from office, as the charter indicates,
12 that at that time -- excuse me one second --

13 (Counsel confer.)

14 MR. HOFMEISTER: -- that according to the charter,
15 he shall be deemed removed from office and the vacancy shall
16 be filled by state law. At that point, I believe it is the
17 Council's prerogative, they have the authority, to appoint
18 someone to fill the vacant seat for the unexpired term, which
19 would mean that they could act, because -- and again in this
20 scenario, this hypothetical, assuming that Mr. Shemwell is
21 removed from office, deemed removed from office, then the
22 Council could act at any time thereafter to fill that vacancy
23 for the unexpired term.

24 THE COURT: And then in this case, I suppose the
25 unexpired term would go until May of 2021.

1 MR. HOFMEISTER: Correct.

2 THE COURT: And at that point there would be
3 another election where just the voters of District 1 would
4 vote in whoever would take up that position starting in
5 May 2021; is that correct?

6 MR. HOFMEISTER: That is my understanding. Yes,
7 Your Honor.

8 THE COURT: And are you -- I know I'm putting you a
9 bit on the spot here. Are you aware of the state law that
10 directs that the Council would be permitted to appoint
11 somebody for that unexpired term? Is that part of the
12 elections code or --

13 MR. HOFMEISTER: I believe it is. I can't point
14 the Court to a section at this point. I'm trying to think if
15 maybe that's actually a constitutional provision under
16 Article 11, but I'm not sure.

17 THE COURT: All right. And another question along
18 these same lines is how often can a Council member be subject
19 to these types of recall petitions? Meaning, you know, if
20 you suppose that one is initiated, it gets on a ballot and it
21 fails, how soon could another one be initiated against the
22 same Council member?

23 MR. HOFMEISTER: May I read from the charter again,
24 Your Honor?

25 THE COURT: Yes, certainly.

1 MR. HOFMEISTER: Yes. Section 149. We're going in
2 order here. Limitations on Recalls. *No recall petition*
3 *shall be filed against the mayor or a Council member within*
4 *four months after he takes office, nor in respect to the*
5 *mayor or any Council member subject of a recall election and*
6 *not removed thereby until at least six months after such*
7 *election.*

8 THE COURT: So hypothetically -- this is for you,
9 Mr. Hofmeister -- if someone was elected, let's say you have
10 a Council member was elected in this election that's in
11 another single-member district; and two months later, there's
12 an initiative to get -- to have him recalled; and let's say
13 within the year, a recall election is made and that person is
14 recalled, and the vote is against them and they're recalled;
15 then the City Council would be able to appoint somebody for
16 the remainder of -- is it a four-year term, or how many
17 years' term?

18 MR. HOFMEISTER: I believe it's a four-year term.

19 THE COURT: So the City Council in my hypothetical
20 would be able to appoint somebody to fill out the remainder
21 of that three-year term; is that accurate?

22 MR. HOFMEISTER: I think that that's correct, Your
23 Honor.

24 MR. ELMAZI: Your Honor, may I provide some clarity
25 about that?

1 THE COURT: Yes.

2 MR. ELMAZI: It's my understanding that if the term
3 is less than one year until the Council person would be up
4 for reelection, then the Council or mayor would be able to
5 appoint someone; otherwise, a special election would need to
6 be called.

7 MR. HOFMEISTER: I think that's correct. I think
8 that is a correct statement of the law. A year or less, then
9 the Council has the authority to appoint.

10 THE COURT: All right. And so if it was, if there
11 was more than a year remaining, then --

12 MR. HOFMEISTER: A special election.

13 THE COURT: -- a special election would need to be
14 called. And that special election presumably would again be,
15 if it's a single-member district, the single-member district
16 voters selecting a new Council person. Would that be
17 accurate?

18 MR. HOFMEISTER: That is my understanding, Judge.

19 THE COURT: Does that sound right to you,
20 Mr. Elmazi?

21 MR. ELMAZI: Yes, sir, that's our understanding.

22 THE COURT: All right. And, Mr. Elahi, I have
23 one -- you can remain up there, Mr. Hofmeister, in case you
24 have some rebuttal. But I have one or two more questions for
25 Mr. Elahi before we go back to you on your argument.

1 Mr. Elahi, you did -- you have talked a bit about
2 the argument that you made by about the City Council or
3 Council members being a moving force behind the recall, and I
4 just want to make sure I understand your argument. It seems
5 to me that you understand the distinction between a Council
6 member acting in an official capacity versus a Council member
7 who is acting as an individual citizen of McKinney; correct?

8 MR. ELAHI: Yes, Your Honor.

9 THE COURT: And so, for example, a Council member
10 acting as an individual citizen, I take it, could sign a
11 recall petition, and you don't think that would be
12 problematic; is that right?

13 MR. ELAHI: That's correct, your Honor.

14 THE COURT: If all they did was sign the petition.

15 So if -- on the other side of the spectrum, you're
16 not alleging conduct in any directly official capacity,
17 meaning you're not alleging that the mayor or other City
18 Council members have taken actions in an official capacity to
19 move this recall, or are you making that allegation?

20 MR. ELAHI: Your Honor, in order to clarify, I'm
21 basically putting on the record what we believe at this point
22 can establish that nexus. And the feelings we have is Mayor
23 Fuller engaged in making sure that the petition numbers are
24 collected, which he may say he did that in his personal
25 capacity, but it remains to be seen. We'll have to depose

1 him to see how he initiated or how he paid those people to
2 get the signatures. So I think that needs to be looked into.

3 Secondly, Your Honor, we do believe he made social
4 media posts as the Mayor of McKinney encouraging the petition
5 or -- and/or supporting the petition, which we believe goes
6 to the other argument that there's he became the moving
7 force.

8 And, thirdly, Your Honor, we believe that the
9 conduct of the City Council members, which can be very easily
10 established or, rather, witnessed if we were to proceed, and
11 we can show the Court down the road in an evidentiary setting
12 perhaps, in a hearing, what was said from the podium -- now,
13 that could be privileged, that could be political speech --
14 but that clearly states that they were acting in unison
15 bashing Council Member Shemwell and making sure that the City
16 of McKinney knew that all the Council members in their
17 official capacity were behind the petition.

18 Now, that's arguable that they have complete
19 privilege to do that. I don't know, Your Honor. And that is
20 another thing we can look into. But, Your Honor, I think
21 that does become secondary once you look into the fact of the
22 totality of circumstances that they went out of their way
23 to -- once they started bashing Council Member Shemwell on
24 the podium for what they thought his behavior was, Your
25 Honor, they changed the charter amendment, the recall -- I

1 apologize -- they changed the process of the recall to make
2 it easier -- less signatures, more time -- to make sure that
3 they could do what they wanted to do, Your Honor.

4 And, secondly, now they would say, well, citizens
5 voted on it. Yeah, we understand that. But, Your Honor,
6 when they looked at the recall charter, which was I believe
7 written in 1958, I believe, Your Honor, if I'm not mistaken,
8 that actual language that they changed, they left alone the
9 language that talked about citywide elections, not taking
10 into account that there were no single-member districts back
11 then.

12 So why would they overlook such a crucial thing if
13 their whole agenda was not to make it easier to recall
14 somebody they didn't like and, on top of that, to basically
15 not respect the constitutional changes that had taken place
16 in the country all over, Your Honor, to make our democracy a
17 better and better-functioning democracy?

18 So I believe, Your Honor, there is a lot to be
19 looked into. Your Honor, last time they were blocking all
20 depositions. They were saying, no, it's all privileged.
21 Your Honor, I believe if Mr. Shemwell is even set aside as a
22 plaintiff, the other two voters have the right to look into
23 why their vote was diluted by a Council that just didn't
24 happen to like one individual.

25 Nobody is saying they cannot have a recall. Nobody

1 is saying they cannot, you know, go ahead and, as citizens,
2 say, hey we don't like Mr. Shemwell, or even the Council
3 members, perhaps, and say, okay, vote against him outside.
4 But, Your Honor, what happened -- by the way, Your Honor, I
5 would also point out that we also have evidence that
6 Mr. Fuller, George Fuller, the Mayor of McKinney, he has been
7 telling people that he would replace Mr. Shemwell with
8 another African-American. I believe that's highly offensive
9 to all District 1 members of voters; they get to decide who
10 gets there.

11 But that is -- those are the kind of language
12 that's being used in this that leads us to believe that there
13 is an undercurrent of personal political animus that
14 motivated and became the moving force of the City to
15 completely violate the constitution to reach a political end.

16 And I believe, Your Honor, we are in front of you
17 to basically give you the information that we have, and
18 obviously the City will give theirs, to make a judgment on
19 that, Your Honor. I believe, Your Honor, that we should be
20 allowed to do that by engaging in discovery, Your Honor, and
21 that's why we don't believe we should be dismissed today.

22 THE COURT: Let me ask you one more hypothetical,
23 Mr. Elahi, which is hypothetically, you've already said that
24 you don't think there is a problem with members of the City
25 Council as individual -- acting as individual citizens with,

1 for example, signing a petition, a recall petition
2 initiative; correct?

3 MR. ELAHI: Yes, Your Honor. I believe that there
4 may be appearance of impropriety, but I don't think there is
5 anything illegal or anything wrong with that, no.

6 THE COURT: And would you think it would be
7 problematic for, again hypothetically, for City Council
8 members speaking as citizens, to speak in favor of a recall
9 petition?

10 MR. ELAHI: Yes, Your Honor, they have a First
11 Amendment right.

12 THE COURT: All right. So I take it that in this
13 case you're saying that you believe there is evidence that
14 the actions of other City Council members went beyond those
15 kinds of actions in such a manner as to rise to the City
16 Council or -- acting in unison or in some sort of official
17 capacity against this Mr. Shemwell.

18 MR. ELAHI: Yes, Your Honor.

19 THE COURT: All right. All right. That's all the
20 questions I had for you, at least at this time, Mr. Elahi.

21 Mr. Hofmeister, do you have any rebuttal argument
22 you would like to make?

23 MR. HOFMEISTER: If I may, Your Honor.

24 THE COURT: Yes.

25 MR. HOFMEISTER: I would like to clarify one thing

1 that we talked about earlier, and that was on what happens if
2 Mr. Shemwell's recalled and we have a situation where less
3 than one year of the term remains, and I believe that that is
4 under the Texas constitution, I believe it's Article 11,
5 Section 5, if I'm not mistaken. But in that instance, the
6 City Council has the authority to appoint someone to fill
7 that vacancy, but they do not necessarily have to do that.
8 They have the -- they have the authority, the option, to not
9 fill it and to let it go until the next election.

10 THE COURT: If it is within one year.

11 MR. HOFMEISTER: If it is within one year.

12 THE COURT: And then if it is more than one year,
13 are they obligated, I take it, to call a special election?
14 Is that --

15 MR. HOFMEISTER: I believe that that's the case,
16 yes.

17 THE COURT: All right.

18 MR. HOFMEISTER: Let me see here.

19 THE COURT: And is that, that requirement of
20 calling a special election, is that another -- is that a
21 State Elections Code provision, constitutional provision? Or
22 are you aware one way or the other?

23 MR. HOFMEISTER: Constitutional? Yeah,
24 constitutional.

25 THE COURT: All right.

1 MR. HOFMEISTER: One other thing, too. Mr. Elahi
2 mentioned about, in the first case, that we somehow wouldn't
3 allow depositions or discovery to be taken, and I would just
4 simply say that the City was never noticed to have any
5 depositions of any of its officials taken, so we never
6 blocked any attempts to discovery or anything by the
7 plaintiffs -- or the plaintiff in that case.

8 The other thing I want to address specifically is
9 the what we're hearing today for the first time, frankly,
10 concerning the mayor, other Council members, that sort of
11 thing. We're here on a motion to dismiss, so the focus has
12 to be the face -- what appears on the face of the pleading,
13 on the complaint itself. And there is nothing in there about
14 the activities -- certainly, what they're referring to
15 concerning a video and this piece of evidence.

16 But I would like to at least get into the record
17 what we stated in our reply, pardon me, concerning this
18 so-called piece of evidence -- this so-called video piece of
19 evidence. And that is to support their claim, plaintiffs
20 point to a single piece of evidence, quote, unquote,
21 "Allegedly reflecting actions of the mayor that are not
22 alleged in the complaint; that are not alleged to be
23 unlawful; that plaintiffs admit fall within the mayor's
24 rights as an individual citizen; that are not alleged to be
25 tied in any way to an official policy, practice, custom, or

1 usage of the City; and that are not tied to the action of any
2 other member of the City's policy-making governing body, the
3 McKinney City Council.

4 "Plaintiffs have failed to articulate or identify
5 and, therefore, have failed to plead, a causal connection
6 between the City's policy maker, the City Council, and the
7 injury allegedly sustained by them, which was the result of a
8 citizen-driven recall petition submitted to the City that set
9 into motion the recall process provided under McKinney City
10 Charter."

11 They cite absolutely no case law or other
12 authority, none, for the position they take concerning any
13 alleged wrongdoing by the City, or City liability, under
14 Section 1983. And I believe that that remains unchanged as
15 of this morning.

16 So what we're looking at, under Section 1983 again,
17 is some sort of a policy statement by the Council. And while
18 you may have individual Council members, including the mayor,
19 out there expressing their First Amendment right, freedom of
20 speech, to support or not support someone in a political
21 position, there is no nexus, there is no causal connection
22 between such actions, such individual actions and any sort of
23 action, official action, taken or implemented by the
24 governing body, the City Council itself.

25 THE COURT: Can I ask you a hypothetical along

1 those lines, Mr. Hofmeister, which is right now we're in the
2 situation where at this point in time we're talking about
3 just the petition procedures and that Mr. Shemwell's
4 articulation of an injury would fall within *McBride*, meaning
5 that, you know, at least *McBride* principle, that these
6 petitions are not subject to the Voting Rights Act.

7 So let's say we take this after the vote. After
8 the vote, if the vote is taken and if Mr. Shemwell is voted
9 out, at that point if he's trying to articulate an injury and
10 saying I am injured by a City provision, I'm injured by the
11 charter amendment that says the entire City is voting on this
12 rather than just my district, is he -- does he then -- are we
13 then back to where the law is unsettled? Or do you think
14 that that's still -- there is still not an articulation of
15 something that would fall within their 1983 claims, as you
16 see it?

17 MR. HOFMEISTER: I think there's still no colorable
18 cause of action that can be brought by Mr. Shemwell, even at
19 that point, under Section 1983. It is the result of an
20 election that the City Council -- that the City was required
21 to put before the voters. The City itself had nothing to do
22 with the results of an election. The City cannot cast a vote
23 in the election; and, therefore, there is no direct causal
24 connection. It is cut between the injury allegedly visited
25 upon the plaintiffs and the City. And that goes back again

1 through Monell and its progeny to the present day.

2 THE COURT: All right. Thank you. Do you have any
3 other remarks today, Mr. Hofmeister?

4 MR. HOFMEISTER: Not unless the Court has any other
5 questions for me.

6 THE COURT: No, I don't.

7 MR. HOFMEISTER: Thank you, Your Honor. Appreciate
8 your time this morning.

9 THE COURT: All right. Thank you, Mr. Hofmeister.

10 Mr. Elahi, anything further from the plaintiffs
11 this morning?

12 MR. ELAHI: Your Honor, nothing. I'm not going to
13 rebut what Mr. Hofmeister said. I just want to point out,
14 Your Honor, I was -- we were talking about the standard for
15 removing a municipal officer earlier, Your Honor. So I
16 looked up the local government code, Title 2, Chapter 21.
17 And, Your Honor, under 21.025, it reads General Grounds for a
18 Removal. *A, An officer may be removed from office for, one,*
19 *incompetency; two, official misconduct or intoxication on or*
20 *off duty caused by drinking an alcoholic beverage.*

21 And, Your Honor, I believe that that does apply to
22 the municipality as well, at least incompetency, and official
23 misconduct definitely does. It's Chapter 21. And if I'm
24 misreading it, Your Honor, I apologize, but I believe it
25 applies to the general law of a municipality. And, Your

1 Honor, I believe that's the standard for the removal. And
2 why McKinney doesn't have that standard, I don't know. But
3 even if they haven't articulated one, I assume that they
4 would have to follow this one as this is a state law, Your
5 Honor.

6 THE COURT: Well, I think Mr. Hofmeister can
7 address that and is about to.

8 MR. HOFMEISTER: Yes, Your Honor. Thank you.

9 As Mr. Elahi indicates, that provision relates
10 specifically to general law cities, not to home rule cities.

11 THE COURT: Right. And I was going to say this is
12 a home rule municipality; right?

13 MR. HOFMEISTER: Absolutely.

14 MR. ELAHI: Well, I -- I apologize. Then I take my
15 argument back, and I apologize.

16 MR. HOFMEISTER: No, that's quite all right. But
17 state law mandates that the charter provision controls. And
18 so that's what we look to, and that's what we read into the
19 record earlier.

20 THE COURT: Right. That's my understanding, it's a
21 home rule municipality that, therefore, the City is going to
22 determine what the grounds are going to be for this type of a
23 recall situation.

24 MR. HOFMEISTER: Correct. With whatever clarity or
25 however broad-sweeping they want it to be, that's the

1 language that's adopted and that is contained in the charter
2 itself.

3 THE COURT: All right.

4 MR. ELAHI: Your Honor, as long as it's not
5 unconstitutional, I think the City would agree that even if
6 it's broad, it still would have to be within the boundaries
7 of the constitutional expectations, Your Honor.

8 MR. HOFMEISTER: The City agrees that the charter
9 cannot contravene state law or the constitution, so but we
10 don't think there is any problem in this case in that regard,
11 and that's what we have pled in our motion to dismiss,
12 effectively.

13 THE COURT: Right. I haven't heard -- I certainly
14 haven't heard any argument that the mere fact that the City
15 has not set a standard, if you will, for what voters should
16 be looking to in initiating this kind of recall petition,
17 that that in and of itself standing alone would present a
18 violation of certainly a federal law or the federal
19 constitution. I haven't seen that argument.

20 MR. HOFMEISTER: I don't believe it's there, Your
21 Honor. I don't think it's been made.

22 THE COURT: All right. I'll tell you what. I'm
23 going to take this under advisement right now. One,
24 something that's come up a few times in our discussion today,
25 is whether or not it would be helpful to submit an additional

1 supplemental brief for both sides. Is that something that
2 plaintiffs and/or defendants would like to do?

3 We'll hear from Mr. Elahi.

4 MR. ELAHI: Yes, Your Honor. I do believe that
5 would be helpful, Your Honor.

6 THE COURT: All right. Mr. Hofmeister?

7 MR. HOFMEISTER: Yes, Your Honor. As the Court
8 knows, we filed a motion to dismiss. We got the response
9 from the plaintiffs. We have filed a reply. So I think all
10 things being equal, it's -- you know, taking it in order,
11 it's time for the plaintiffs to submit any sort of pleading
12 that they want in the way of a sur-reply. And if we could
13 have the opportunity to respond or reply to that sur-reply,
14 we would request that.

15 THE COURT: Yeah, I think that makes sense.

16 So, Mr. Elahi, will it work for you and your
17 co-counsel to submit a sur-reply within a week, a week from
18 now? And I would like to have this, both follow-on briefs,
19 to be limited to no more than ten pages. And don't even feel
20 like you need to get it to ten pages, but just limit it to
21 ten pages.

22 Would a week work for you, Mr. Elahi?

23 MR. ELAHI: Your Honor, may I request until next
24 Friday? I'm looking at the date, Your Honor. I'm --

25 THE COURT: That's fine.

1 MR. ELAHI: Next Friday would be --

2 THE COURT: The 30th, I believe?

3 MR. ELAHI: Yes, Your Honor. Would that be okay
4 with the Court?

5 THE COURT: Yes, that's fine. So we could do an
6 order today that your sur-reply will be due the 30th.

7 And then you can, Mr. Hofmeister, the City can do a
8 response to the sur-reply a week later, which I believe is
9 going to be around March 7th, roughly --

10 MR. HOFMEISTER: Probably the 6th, I think.

11 THE COURT: -- the 6th or 7th. Right. It will be
12 the following Friday. It will just be set a week later.
13 Does that work for the City?

14 MR. HOFMEISTER: That works for the City, Your
15 Honor.

16 THE COURT: All right. And these can be -- it will
17 be helpful to the Court if, even if it's briefly addressed,
18 some of the things that we were talking about today, just so
19 I know exactly the law that's applicable on some of these
20 what I would refer to them as procedural aspects and the law
21 that's governing with regard to recall elections, and then
22 anything else that you need to add that you think bears on
23 the issues that we've discussed today, and particularly the
24 questions I had for you, and the authorities you've relied
25 upon and other authorities that may be out there on these

1 issues.

2 All right. Thank you, counsel. We will stand in
3 recess on this case.

4 MR. HOFMEISTER: Thank you, Your Honor.

5 MR. ELAHI: Thank you, Your Honor.

6 THE COURT SECURITY OFFICER: All rise.

7 (Adjourned at 10:47 a.m.)

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10 CERTIFICATE OF OFFICIAL REPORTER

11

12 I, Gayle Wear, Federal Official Court Reporter, in
13 and for the United States District Court for the Eastern
14 District of Texas, do hereby certify that pursuant to Section
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18 transcript page format is in conformance with the regulations
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21 Dated 16th day of December 2021.

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23 /s/ Gayle Wear
24 GAYLE WEAR, RPR, CRR
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